IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Raptis v. Chalabiani,*
2017 BCSC 1548

Date: 20170831
Docket: M114224
Registry: Vancouver

Between:

Jennifer Raptis

Plaintiff

And

Sahar Chalabiani and Margot Cosbie Ware

Defendants

Before: The Honourable Madam Justice W. J Harris

Reasons for Judgment

Counsel for Plaintiff:	F.R. Sierecki M.J. Konig
Counsel for Defendants:	D. S. Jarrett R. Robertson
Place and Date of Trial/Hearing:	Vancouver, B.C. October 11 to 14; 17 to 21; and 24 to 28, 2016
Place and Date of Judgment:	Vancouver, B.C. August 31, 2017

I. OVERVIEW

[1] The plaintiff, Jennifer Raptis, a 37 year old teacher and mother of two children, brought an action against the defendants, Sahar Chalabiani and Margot Cosbie Ware, for injuries and loss resulting from a motor vehicle collision which occurred on December 2, 2009 (the "MVA").

[2] Liability for the MVA was admitted by the defendants. The issues at trial relate to the assessment of the plaintiff's damages. Specifically, what injuries, if any, did the plaintiff sustain in the MVA and what has been the impact on her life.

II. BACKGROUND

[3] The following summary reflects the evidence that was generally not in dispute or which I have found is supported by the evidence as a whole.

A. Before the MVA

[4] The plaintiff was born on December 23, 1979. Her father was a police officer and her mother worked for McMillan Bloedel. She testified that she had a wonderful childhood. Her grandparents looked after her while her parents were at work and she was close to them and her cousins.

[5] After graduating from high school, she went to Douglas College and then Simon Fraser University where she obtained her bachelor's degree and subsequently qualified as a teacher. After working for a period in a number of districts as a teacher on call, the plaintiff obtained employment in the Burnaby School District, teaching intermediate grades. She was placed at category 5 on the salary scale.

[6] She lived an active life. She was an avid runner, participating in one-half marathons and mini-triathlons. She also played beach volleyball, swam, hiked, and took fitness classes. She did not have any difficulties with her hip or related pain prior to the collision.

[7] She married Peter Raptis in July of 2008. Her husband is an entrepreneur who operates restaurants. At the time of the MVA, they lived in a two bedroom loft apartment in Burnaby.

[8] The plaintiff testified that it was always planned that she would work full time and that she planned to continue to work full time after she had children, as her mother had done before her — with the assistance of extended family members.

[9] The plaintiff acknowledged that she had some medical issues before the MVA. She had polyps on her vocal chords, which had to be surgically removed in 2007. She said that before the polyps were removed, she was worried about the possibility of losing her voice and the impact that this would have on her career. The plaintiff also acknowledged that she had periods of depression and anxiety prior to the accident relating to a number of other issues including difficulties she and her husband were having in conceiving and in their relationship; coping with the death of her grandmother; and feelings of being "overwhelmed" due to work stress. She sought counselling with a Dr. Prupas in 2006, 2008, and 2014. She was also referred to a psychiatrist, Dr. Rana, in April of 2009 for anxiety. She was prescribed various anti-depressants but stopped taking them when she was trying to get pregnant.

[10] In September of 2009, the plaintiff had enrolled in part-time post-baccalaureate training to enhance her qualifications and increase her income as a teacher.

B. The Collision and Aftermath

[11] The plaintiff testified that, on the day of the MVA, she was on her way to Save-On-Foods on the Lougheed Highway. She was coming out of her Burnaby apartment complex and turned right onto Dawson Street. Shortly thereafter, while still on Dawson Street, she heard honking behind her. She slowed down to look to see what was happening, at which point a Mini Cooper vehicle owned by the defendant Ms. Ware and driven by the defendant Ms. Chalabiani struck the plaintiff's

Mini Cooper from behind. The plaintiff's vehicle was pushed forward approximately a half a car length. The air bags did not deploy.

[12] The plaintiff recalls her body being jolted forward and down to the right. She said she sat for a moment in shock. She was approximately 10 weeks pregnant and was immediately concerned about her unborn child. She said that the other driver came to the window yelling at her. She got out of the car, and people came up to her offering assistance.

[13] The plaintiff testified that she asked the other driver to stop yelling. She attempted to explain that she was pregnant and needed an ambulance.

[14] She said that she thought that the other driver smelled of alcohol and asked the other driver if she had been drinking. The driver showed her groceries, drank from a water bottle, and then drove away. She obtained the other driver's licence plate number.

[15] After the collision, she said she felt pain on her left side and felt cramping. She said that the ambulance attendants checked her out and endeavoured to calm her down as she was very concerned for the unborn baby. Once her husband arrived at the scene, she drove with him to the emergency room at Burnaby General Hospital.

[16] The medical staff at the Hospital arranged for her to have an ultrasound due to her concerns about abdominal pain and any effect on her pregnancy. The ultrasound did not disclose any negative findings. The medical staff recommended that she take Tylenol and participate in physiotherapy. She returned home with her husband later that evening. She said that she felt pain on the whole of her left side: her neck, shoulder, hip, and down her leg. She had to sleep on her right side in the foetal position.

[17] She said that she went to her family physician, Dr. Sam, two days later, and that she recommended Tylenol, physiotherapy, and rest. She said the pain on her right side persisted over the weekend and remained the same the next week.

[18] The collision caused a dent to the plaintiff's vehicle. The repair costs were approximately $1,700.

C. Return to Work

[19] The plaintiff said that she went back to work on the Monday following the MVA to tell the staff and students she would be off work for the remainder of December, but she fainted at work. She broke her tooth when she hit her head on the desk and was taken by ambulance to Royal Columbian Hospital. She had another ultrasound, again due to concerns about her unborn baby. The ultrasound was normal.

[20] She returned to work in January of 2010 and worked on a full-time basis. She took leave in May of 2010, approximately one month before the birth of her first child. She testified that she took leave earlier than she had planned due to pain in the hip which she said became so bad that she could barely walk and could not take any medication other than Tylenol.

[21] After one year of maternity leave, the plaintiff returned to work on a full-time basis in September of 2011. In February of 2012, when she was pregnant with her second child, she took a medical leave due to the persistent pain in her hip and because she was having difficulty walking. After her second son was born in March of 2012, she took a maternity leave for approximately one year and a further extended period of leave, returning to work in September of 2013. Her son was subsequently diagnosed with autism.

[22] The plaintiff returned on a half-time basis, working Mondays, Tuesdays, and alternating Wednesdays. She testified that she worried that if she returned full time she would have to continually take time off due to her ongoing hip pain. She said that she talked to her doctor and that her doctor agreed that part-time work would be best for her.

D. The Plaintiff's Injuries

[23] The plaintiff was diagnosed with soft tissue injuries to her back, left shoulder, and hip with lower back pain, groin pain, and lateral hip pain on her left side.

[24] She testified that she has daily pain from the MVA, particularly in her hip and lower back. She said she has more energy in the morning and that the pain gets worse with increased activity and the demands of the day. The pain tires her and limits her ability to engage in various activities of daily living including physical exercise, childcare, and household chores.

[25] She testified that it is very hard to sleep on her left side, and when she wakes up on her left side, it is hard to get back to sleep. She said she has to continually manoeuvre herself to try and find a comfortable position without pain.

[26] The plaintiff was initially diagnosed a labral tear in her hip and underwent a left hip arthroscopy in January of 2015. She testified that the surgery did not help the pain in her left hip and the pain is somewhat worse.

[27] She was also diagnosed with an adjustment disorder with mixed anxiety and depression. Her pain issues caused her increased anxiety and depressive symptoms due to a combination of the persistent, non-responsive nature of the pain and the limitations it caused. She received psychological counselling in relation to the anxiety and depression.

E. General Impact of MVA on Plaintiff

[28] The plaintiff described ongoing pain from the MVA, particularly in her hip area. She also described pain in her back and left shoulder.

[29] The plaintiff's efforts at rehabilitation were delayed due to her pregnancies. She said that after the MVA she had tried active rehabilitation 10-15 times, but she found it too uncomfortable to continue in the later stages of her pregnancy. After her pregnancies, she engaged in extensive physiotherapy and active rehabilitation, but found that pain from the MVA persisted.

[30] After her first child was born, she returned to physiotherapy, focussing on strengthening and mobility. She said that it provided some temporary relief, and she learned about how to manage her condition at home. She also tried running, but found it caused her pain to flare up. She no longer runs.

[31] After her second son was born, she participated in active rehabilitation for approximately one year, after which she used personal trainers, as well as physiotherapy and chiropractic sessions.

[32] The plaintiff described her emotional state after the MVA. She testified that she has become an irritable and moody person. She testified that her constant pain has changed the family dynamic. Her relationship with her husband has been negatively affected in that there is not the same level of intimacy. She is not able to give her children her full attention as she is limited in how she can interact physically with the children and does not have the energy to be active with them. She does not participate in social and physical activities to the same extent as she did. She also is unable to do certain of the heavier household chores she previously was able to do.

[33] While the plaintiff described having to live a less physical life due to her injuries and pain, I do note that she still participated in various physical activities since the MVA in an effort to regain her physical fitness. She participated in the Sun Run in Vancouver, a 10 km walk or run event in 2010. She also reported to her family physician, Dr. Sam, that she had tried “swimming, running, walking and yoga” in 2011, but reported pain with running. More recently, she attended a CrossFit gym, although modified the exercises due to pain and limitations.

III. MEDICAL EVIDENCE

A. Plaintiff’s Experts

1. Dr. Gilbart

[34] Dr. Gilbart is an orthopaedic surgeon, with particular experience in arthroscopic hip surgery. As the plaintiff’s treating orthopaedic surgeon, he conducted physical examinations of the plaintiff on May 8, 2011; December 1, 2014;

May 25, 2015; and January 26, 2016. He prepared a report on the plaintiff's condition dated April 14, 2016 and gave expert evidence at trial.

[35] In his April 14, 2016 report, Dr. Gilbart diagnosed the plaintiff with:

1. left high labral tear, mild chondrosis, synovitis;
2. left hip extra-articular myofascial pain;
3. left hip trochanteric bursitis, gluteal tendinopathy;
4. left SI joint strain, mild osteoarthritis; and
5. myofascial pain cervical and lumbar region, left shoulder.

[36] In his opinion, the pain in her hip is emanating from the labral tear, chondrosis, and/or synovitis, as well as from some soft tissue damage.

[37] Based upon the temporal relationship between the plaintiff's symptoms and the MVA, Dr. Gilbart was of the opinion that the accident probably caused an injury to the cartilage structures in her left hip. He testified that while it was possible that she had some labral tearing and mild chondrosis prior to the MVA, she did not have symptoms of pain. Therefore, he considered the MVA either injured the cartilage structures and soft tissues surrounding the hip or aggravated a pre-existing condition.

[38] He also attributes her mild SI strain, low back pain, and neck and left shoulder pain to the MVA. However, he does not recommend further investigation or treatment for them, other than to continue with a home exercise and rehabilitation program to maintain her strength and flexibility.

[39] Although he did not initially diagnose a labral tear, he testified that the medical imaging he subsequently ordered suggested a labral tear as there was significant improvement of her left hip pain symptoms reported following diagnostic

intra-articular hip injections. He therefore modified his initial opinion and concluded that a significant component of her pain was coming from the hip joint.

[40] He performed a left hip arthroscopic debridement, synovectomy, partial labral debridement, small capsulotomy, and a trochanteric bursectomy on January 20, 2015. He found evidence of grade one chondrosis (mild softening of the articular cartilage) of the acetabulum; a moderate amount of synovitis; some intra-substance labral tearing (unstable flaps); inflammation of the labral acetabular junction consistent with limbus; and thickened and inflamed bursa. He also found clinical evidence of extra-articular myofascial pain in the buttock and posterolateral left hip soft tissues.

[41] He reported that she did not notice any improvement from the hip arthroscopy surgery, and indeed felt her pain was somewhat worse. Dr. Gilbart testified that the type of hip surgery he performed is generally 60% successful in reducing pain, with 35% of patients reporting no change in pain symptoms and 5% reporting that their pain is worse.

[42] Dr. Gilbart testified that the plaintiff can gradually increase her hours to return to work full time, but whether she would be able to tolerate full-time work would depend on her subjective level of pain, particularly in her left hip region. He noted that she has difficulty with heavier household chores and it is probable that her limitation and pain will continue in the future. In his opinion, the prognosis for any significant improvement in her pain symptoms is poor.

[43] In cross-examination, Dr. Gilbart testified that he was not aware that she had taken a cruise holiday shortly after the MVA or that she had returned to work full time after the MVA, but did not consider this information would alter his opinion. Dr. Gilbart did not agree that lower back pain was common in pregnancy or that there is an increase in laxity in the joints causing discomfort in the last trimester of pregnancy.

[44] Dr. Gilbart said that he was not aware that she was engaged in a modified CrossFit program, and did not know what that type of program would entail. He agreed that the plaintiff told him she could not run and that he was not aware that she participated in the Sun Run. He added that he did not know whether she had walked or run in the event.

[45] He said that he was of the opinion that the plaintiff sustained an injury to her neck and shoulder. He acknowledged that he did not initially examine the plaintiff's neck or shoulder as his focus was on the hips. He also acknowledged that the plaintiff had full range of motion and strength in her neck and shoulders, with no neurological abnormality. He agreed that her complaint in 2013 were of tenderness in those areas.

[46] He confirmed that the SI injury was a strain causing pain not a significant injury to the joint itself. He noted that there was mild sclerosis in that joint which he said was due to mild arthritis.

[47] Although he agreed that the labral tear and chondrosis could be a result of degenerative changes as well as a traumatic event, he maintained that, in his opinion, given the temporal connection of her symptoms to the MVA, it was probable that the MVA caused these injuries.

2. Dr. Lamba

[48] Dr. Lamba is a forensic psychiatrist who gave expert evidence on behalf of the plaintiff. He interviewed the plaintiff and reviewed her medical and psychological history, including her history of depression and anxiety prior to the MVA. His report is dated January 5, 2015.

[49] Dr. Lamba diagnosed the plaintiff with an adjustment disorder with mixed anxiety and depression, and a mild pain disorder. He said that both conditions were causally related to the MVA. In his opinion, the plaintiff experienced an adjustment disorder in the weeks and months following the MVA. He described it as being "mild in intensity and did not require any specific treatment". Over time, as her pain issues

persisted, she had increased anxiety and depressive symptoms. He noted that she had a number of other stressors in her life that contributed to her emotional symptoms that were unrelated to the MVA.

[50] He said that, from a psychiatric point of view, her adjustment disorder did not cause her significant impairments and disability and deferred to medical specialists on her pain symptoms. He said that given her history, she is prone to suffer from depressive episodes and anxiety in the face of stressors and had vulnerability prior to the MVA. While her depressive symptoms will likely continue, the intensity and severity is not expected to increase.

[51] He referred to the post-partum depression the plaintiff experienced following the birth of her two sons in June of 2010 and March of 2013, which he found was not attributable to the MVA.

[52] In cross-examination, Dr. Lamba agreed that his diagnosis of persistent pain symptoms and resulting functional limitations were based largely on her subjective reports to him and others. Dr. Lamba also agreed that the plaintiff's anxiety and depression were not severe enough to keep her at home or to prevent her from performing her daily activities or working. However, he said that her pain has an emotional component which affected how she dealt with stressors.

[53] He said that the impairment reported to him by the plaintiff was mainly running and household duties. He said that her initially returning to work full time was a measure of her functionality at that time.

3. Dr. Badii

[54] Dr. Badii is a rheumatologist who gave expert evidence on behalf of the plaintiff. His report is dated March 23, 2016. Dr. Badii was referred to the plaintiff by Dr. Gilbart to assess her left low back, hip, and buttock pain. Dr. Badii was her treating rheumatologist. He saw the plaintiff on September 30, 2015; December 10, 2015; and on February 26, 2016.

[55] In his report, Dr. Badii diagnosed the plaintiff with soft tissue injuries and lower back pain, groin pain, and lateral left hip pain, with some radiation down the left thigh. He opined that her symptoms were likely due to a combination of the soft tissue injuries and "potentially" mechanical pain from the facet joint or left SI joint. He also stated that the soft tissue injuries had become chronic and that the chance of significant improvement was exceedingly small. Based upon the results of an MRI and blood work, Dr. Badii concluded that there was no indication of inflammatory causes for her pain.

[56] He attributed the plaintiff's pain symptoms to the MVA on the basis of the "close temporal relationship between the accident and the onset of symptoms as well as the medical plausibility of the above injuries being caused following the type of accident (high speed rear-ender) in which Ms. Raptis was involved".

[57] Dr. Badii made a number of treatment recommendations, including diagnostic injections, physiotherapy, gym exercises, swimming, and naproxen as needed.

[58] In cross-examination, Dr. Badii testified that he believed that it was the plaintiff who described the accident as a "high speed rear-ender". However, he said the severity of the accident would not necessarily be indicative of the severity of the injury to the persons involved in the accident. He agreed that he did not have information as to the severity of the collision in this case. He said that his opinion was not based on the collision being a high speed collision.

[59] Dr. Badii said that he was not aware of when the plaintiff returned to work after the MVA. He said it would be helpful in determining her functional limitations but would not affect his diagnosis of soft tissue injury. He confirmed that his opinion relied on the plaintiff's account of her functional limitations as to what she could and could not do.

[60] Dr. Badii agreed that pregnancy generally increases the laxity of joints, although he said that it did not increase the risk of joint wear and tear. He also

agreed that pregnancy can alter a person's gait, but did not agree that a change in gait and weight would place stress on the SI joint.

4. Dr. Shuckett

[61] Dr. Shuckett is a rheumatologist who examined the plaintiff on October 17, 2012 at the request of the plaintiff. Dr. Shuckett prepared a report dated December 31, 2012 and supplementary reports dated February 26, 2013 and March 28, 2013 regarding the possibility of a labral tear in her hip. The only physical examination of the plaintiff was conducted on October 17, 2012. The follow-up reports were based on Dr. Gilbart's 2013 report and telephone conversations with the plaintiff.

[62] After reviewing the plaintiff's medical history and reporting on the examination, Dr. Shuckett diagnosed the plaintiff with soft tissue injuries and related pain in her left neck with some decrease in range of motion; myofascial pain syndrome with muscle spasm over the left neck and shoulder girdle; and mechanical low back and left hip girdle pain with sacroiliac ligament strain and possible facet strain. She also suspected a possible labral tear of the left hip and left shoulder rotator cuff tendinosis, with some impingement syndrome of the left shoulder. She attributed the plaintiff's symptoms to the MVA.

[63] With respect to the suspected left rotator cuff tendinosis, Dr. Shuckett acknowledged that she did not have any x-rays or imaging of the plaintiff to confirm this diagnosis as it was not severe enough to support imaging. She described it as a mild reduction in mobility.

[64] Dr. Shuckett also expressed the opinion that the MVA might have contributed to the fainting episode, although she agreed that not eating enough could have contributed to the event. Further, in her opinion, while the pregnancy may have contributed to the sacroiliac ligament strain, the strain was caused by the MVA.

[65] She noted that psychosocial stressors may be contributing to her pain and testified that she was aware of the plaintiff's history of depression and anxiety, but deferred to other specialists on this.

[66] In Dr. Shuckett's second and third reports, she referred to the effect of injections into the plaintiff's left hip by Dr. Gilbart. The plaintiff reported that the freezing and cortisone injection helped her symptoms, albeit temporarily, which suggested to Dr. Shuckett that the pain is probably coming from the hip joint and specifically a labral tear. She left it to Dr. Gilbart to determine whether to do an arthroscopy of the left hip and repair the labral tear.

[67] In cross-examination Dr. Shuckett confirmed that the testing she conducted of the plaintiff relied on her subjective reports. Dr. Shuckett testified that although the plaintiff may be left with some degree of symptoms for the long term, she did not believe that the plaintiff would be "disabled" from working. She also confirmed that the plaintiff told her at the time of the October 2012 examination that she would probably return to work 3 days a week. Dr. Shuckett said she was not aware whether this was due to the plaintiff's pain or having young children.

5. Dr. Sam

[68] Dr. Sam has been the plaintiff's family physician since 1991. She prepared two medical reports on the plaintiff's condition dated February 5, 2013 and April 12, 2016. Dr. Sam attended on the plaintiff on numerous occasions prior to and subsequent to the MVA.

[69] Based upon the plaintiff's reports to her and her review of other medical reports, Dr. Sam expressed the opinion that the plaintiff had suffered soft tissue injuries to her neck, shoulders, lower back, and left hip as a result of the MVA. Dr. Sam said that while her neck and shoulder symptoms have improved, the plaintiff still has some pain with prolonged activity. The pain and discomfort in her left hip has continued and become chronic.

[70] She also expressed the opinion that the plaintiff had psychological effects due to the MVA. It was Dr. Sam's opinion that her hip pain contributed to the plaintiff's sleep disturbance and caused her to "feel emotional and mildly depressed", as well as overwhelmed and anxious. Dr. Sam confirmed that the plaintiff had anxiety prior to the MVA (i.e. about her work, her marriage, an ex-boyfriend, not sleeping, not

conceiving, and the loss of her grandmother) and acknowledged that there have been stressors in her life since the MVA, including the birth of two children.

[71] She stated that she was uncertain if further physiotherapy or rehabilitation treatment was required, although a Synvisc injection in the hip had been recommended by Dr. Badii.

[72] In cross-examination, Dr. Sam agreed that the plaintiff had a history of anxiety and feeling overwhelmed, for which she was previously prescribed anti-depressant medications and was referred to Dr. Rana. She also agreed that she initially did not have any concerns about the plaintiff returning to work full time after the MVA in January of 2010 and that her impression as reflected in her January 14, 2010 clinical note was that the plaintiff's condition was improving.

[73] She said that she subsequently supported the plaintiff's leave applications to work on a 50% basis due to her soft tissue injuries and, secondarily, to her pregnancies.

[74] Dr. Sam confirmed that she saw the plaintiff the day after the fainting episode in December of 2009 and that her notes refer to the plaintiff reporting not having eaten enough that morning. Dr. Sam also confirmed that the plaintiff had been experiencing morning sickness, which typically results in low oral intake and nausea.

[75] Dr. Sam confirmed that the plaintiff had reported to her that she had participated in swimming, running, walking and yoga in 2011— although Dr. Sam noted that the plaintiff had reported pain and discomfort with such activities. She also confirmed that she did not refer the plaintiff to CrossFit and was not aware of the nature of the exercises the plaintiff was performing. Dr. Sam said she later learned that the plaintiff was attending a CrossFit gym in 2015 and 2016.

6. Mr. Pakulak

[76] Mr. Pakulak is a registered occupational therapist, who gave expert evidence in respect of functional capacity evaluations ("FCE").

[77] Mr. Pakulak conducted two FCEs of the plaintiff at the request of counsel for the plaintiff. The first FCE was conducted on January 28, 2013, with a report date of February 18, 2013 and the second FCE was conducted on November 19, 2015, with a report date of December 22, 2015.

[78] In the 2013 report, he noted that she had ongoing symptoms and difficulties resulting from the MVA. He summarized the symptoms and noted her reports of pain based on a "functional pain scale" from 0 to 10. He reported as follows:

1. Left hip and buttock pain: She described it as "daily intermittent aching pain with bouts of short pain" and tended to be worse with standing, walking, climbing, running, bending, crouching and lifting/carrying. She rated the pain as 1/10 at the time of the FCE and within the last 30 days she indicated that her highest and lowest level of pain in the last 30 days were 3/10 and 0/10 respectively;

2. Left low back pain: She described it as "daily intermittent aching and tension pain" in the left side of the low back, which tended to come on when the hip pain is severe. She rated it on the pain scale as 0/10 at the time of the FCE and within a high and low in the last 30 days at 3/10 and 0/10;

3. Left shoulder and upper back pain: She described it as "occasional aching and tension" in her left upper back and shoulder which tended to come on with heavier lifting and carrying. She rated it on the pain scale as 0/10 at the time of the FCE and with a high and low in the last 30 days at 2/10 and 0/10.

[79] Mr. Pakulak agreed that the pain scale is wholly subjective. He said that a score below three is generally non-disabling pain, with a score of three indicating pain that is starting to cause difficulty moving or applying strength through the painful area — affecting a person's productivity or performance and causing them to take small breaks to rest or stretch.

[80] Based upon the test he administered, Mr. Pakulak was of the opinion that the plaintiff was capable of full or part-time work as an elementary teacher at a

competitive and sustainable pace. However, he also opined that, with her ongoing limitations related to prolonged standing in work intensive postures and prolonged below waist level work, “she would be better suited for part time work”. It was his opinion that the plaintiff should keep prolonged and repetitive below waist level work to an occasional basis and that she would need micro-breaks and changes in activities to assist in managing pain from prolonged standing in work intensive positions.

[81] With respect to avocational activities such as housework, he said that she will likely continue to require assistance.

[82] Mr. Pakulak’s second report in 2015 was conducted 11 months after her hip surgery. The plaintiff’s descriptions of pain and ratings based upon the scale provided by Mr. Pakulak were similar although she described pain in the left hip and buttock and in her left low back as daily intermittent aching pain with occasional bouts of short pain at 7/10 at its highest and 1/10 at its lowest in the last 30 days.

[83] Mr. Pakulak’s 2015 opinion as to the plaintiff’s overall work capacity was “largely unchanged” from the opinion he expressed in 2013. However, in his later opinion, he opined that, given that she is working part time with ongoing difficulties and reduced activity levels outside of work, she did not demonstrate the capacity to work full time as an elementary teacher on a competitive or sustained basis.

[84] In cross-examination Mr. Pakulak acknowledged that the plaintiff did not have observable difficulty with filling out forms and speaking to him for a two hour period. He also acknowledged that he did not test the plaintiff’s maximum standing tolerance and that, as a teacher, there was some ability to change positions and move about during the teaching day.

[85] He stated that while he expressed the opinion that she was limited in her ability related to prolonged standing in work intensive postures and below waist level work, he did not have a specific definition for “prolonged”. He said that it does not

necessarily mean that she could not do these things — it would depend on what else she was doing and whether there was an increase in demands.

[86] Mr. Pakulak noted that, in the course of testing, the plaintiff made postural accommodations but nevertheless reported an increase in left hip, buttock, and low back pain at various points in the testing. He testified that her post activity reports of pain in the first and second report were essentially the same (ranging from 2/10 to 3.5/10) with less reports of low back pain in the second tests.

[87] He agreed that the plaintiff's ability to lift and carry was over the National Occupation Classification requirements for a teacher and that, in the second test, her capacity to carry with two hands improved.

[88] When asked about various CrossFit activities, Mr. Pakulak said that he was not aware that the plaintiff was going to CrossFit classes two to three times a week beginning in July of 2015, although she told him she was going to a gym two to three times a week. He did not go into detail as to the nature of the activities she was doing. He agreed that a person's ability to perform such activities could be a measure of the person's strength and stamina, but said it would depend on the frequency and intensity of the exercises.

7. Natalie Allende

[89] Ms. Allende is an occupational therapist that testified as an expert on behalf of the plaintiff on the cost of future care. She prepared a report dated June 21, 2016.

8. Darren Benning

[90] Mr. Benning is an economist who was called by the plaintiff to provide an expert opinion on her past and future income loss and the present value of cost of future care.

B. Defendants' Experts

1. Dr. Masri

[91] Dr. Masri is an orthopaedic surgeon with a specialty in orthopaedic reconstruction of the hip. He prepared a medical legal report at the request of the defendants dated February 1, 2013 and rebuttal and supplementary reports dated April 6, 2013, September 28, 2015, and August 17, 2016. Dr. Masri examined the plaintiff on January 15, 2013 and August 13, 2015.

[92] Dr. Masri diagnosed the plaintiff with trochanteric pain syndrome, which he described as pain in the site of the insertion of the gluteus medius and minimus muscles. In his opinion, her pain is also related to her weak hip abductors. In his opinion, the pain from the MVA would have exacerbated the weakness in the muscles and increased the strain through the abductor tendons, which caused inflammation and pain. He also diagnosed soft tissue strain to the plaintiff's neck and shoulder, although he was of the view that the strain was not significant and would resolve quickly.

[93] Further, he diagnosed the plaintiff with left sided back pain, which he noted worsened during pregnancy and improved after pregnancy. He noted that back pain is common during pregnancy. In his opinion, it was not likely related to the MVA.

[94] He recommended abductor strengthening and core strengthening and posture exercises. He considered her prognosis to be "excellent", and opined that she should have been able to return to work in September of 2013.

[95] He disagreed with Dr. Gilbart and Dr. Shuckett that there was a labral tear to the hip joint sufficient to warrant surgery. In his second opinion, he affirmed his opinion that the pain was coming from the buttock region and not in the groin and noted that he and Dr. Gilbart had found she had a negative impingement test (i.e. she did not report pain when the hip was rotated during examination). With respect to the low back and buttock pain, Dr. Masri stated that the pain was not disabling and he had expected it to improve with core strengthening.

[96] Dr. Masri's third opinion of August 13, 2015 was prepared after the arthroscopy conducted by Dr. Gilbart. Dr. Masri maintained his opinion that the plaintiff's pain did not result from a labral tear and noted that the location of the pain was over the outside of the hip and there was no detachment of the labrum off the acetabulum as reported by Dr. Gilbart. In his opinion, the plaintiff's reports of continued symptoms, despite the removal of the frayed portions of the labrum, supported his previous diagnosis of trochanteric pain. In light of the persistence of the pain, he opined that her symptoms will continue. In that regard, he referred to her reports that the pain was variable from day-to-day, that she has some difficulty sitting and needs to shift or stand, and that she cannot sleep on her left side. Dr. Masri recommends that she would benefit from ongoing rehabilitation, but not physiotherapy.

[97] With respect to her neck and left shoulder, Dr. Masri confirmed his previous opinion that her symptoms were "minimal" and that, for all intents and purposes, she is now "asymptomatic", with the exception of minor discomfort in the left shoulder on rare occasions. He described her upper back pain as "negligible".

[98] With respect to her lower back, he noted that the pain varies in intensity depending on activities and is at its worst between 6:00 and 7:00 pm, three to four times per week. He stated that the pain, for the most part, does not interfere with her day-to-day activities. In that regard, he noted that she reported to him that the reason she is working part time is that she feels that if she works full time it will aggravate her pain and cause her to take too many days off work.

[99] In Dr. Masri's fourth opinion of August 17, 2016, he reiterated his view that the plaintiff's pain was not caused by a labral tear and inflamed synovium. Although Dr. Masri considered the plaintiff's symptoms were not referable to the hip joint, he confirmed his opinion the plaintiff had trochanteric pain which was related to the MVA.

2. Shannon Smith

[100] Ms. Smith is an occupational therapist who conducted a functional capacity evaluation of the plaintiff and prepared a report dated July 15, 2016. She also provided a responsive report on cost of future care dated August 29, 2016. In addition, she prepared two responsive reports dated April 9, 2013 and May 7, 2013 to the reports of Mr. Pakulak.

[101] Ms. Smith stated that the plaintiff displayed a high level of effort in testing.

[102] She observed “very mild left hip weakness” when the plaintiff ascended stairs and found that she is capable of short interval mild stooping, but is not suited to prolonged sustained mild stooping. Ms. Smith observed that the plaintiff’s tolerance improves if she has some degree of external support and/or opportunities for dynamic movement/weight shifting. She is capable of moderate to extreme stooping for brief intervals. She is also capable of kneeling and crouching.

[103] Ms. Smith found that the plaintiff is able to perform jobs that require reaching, handling, fingering, and upper limb coordination.

[104] She found the plaintiff capable of light and entry level medium strength work activities on an occasional basis. She found her to have a sitting tolerance of approximately 30 minutes at a time and that she is functional for standing for at least 1 hour and 30 minutes. Standing and sitting is improved with opportunities for dynamic movement and shifting positions, respectively.

[105] Ms. Smith found that the plaintiff is able to perform most of the demands of her job, as described in the National Occupation Classification, but is not well suited for sustained or repetitive mild stooping and highly repetitive dynamic weight shifting when moving between students. Ms. Smith noted that the plaintiff has incorporated modifications in her work (e.g. sitting on a chair to move between desks and using a high stool). In Ms. Smith’s opinion, the plaintiff has the capacity to increase her hours, with additional ergonomic aides and work style modifications, to working three to four days with a recovery day between two consecutive shifts. She also

suggested that, as her children age, she may have less overall symptom aggravation.

[106] In cross-examination, Ms. Smith stated that when the plaintiff reported discomfort with an activity, it does not mean that she cannot continue with the activity but signals the need to manage the symptoms such as moving into a new position. She confirmed that, in her opinion, the plaintiff's work limitation is mild for stooping and noted the plaintiff took modifying postures.

[107] She stated that her recommendation was that a number of additional measures were available to manage her symptoms.

IV. LAY WITNESSES

[108] A number of the plaintiff's friends and family members gave evidence on her behalf. They testified to the change they observed in the plaintiff since the MVA and the support they provided to the plaintiff in terms of child care and household chores. They referred to her being less social, slowed down, less attentive to her appearance, depressed, and unable to participate in the active lifestyle that she had before the MVA. They also testified as to her physical limitations and pain symptoms they observed after the MVA.

[109] Her work colleagues spoke to the physical demands of a teaching position and the difficulties they observed the plaintiff was having in carrying out various physical aspects of her duties.

V. LIABILITY

[110] As noted above, the defendants admit liability for the collision. The issue is the quantum of damages to which the plaintiff is entitled.

VI. CREDIBILITY/RELIABILITY

[111] In *Bradshaw v. Stenner*, 2010 BCSC 1398, aff'd 2012 BCCA 296, Madam Justice Dillon reviewed the factors to be considered in assessing credibility:

> [186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont.H.C.); *Farnya v. Chorny*, [1952] 2 D.L.R. 152 (B.C.C.A.) [*Farnya*]; R*. v. S.(R.D.)*, [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Farnya* at para. 356).

[112] In this case, the defendants submit that the plaintiff's evidence is not reliable in that her self-reports to various treating and expert physicians are contrary to her actual capacity for work and leisure activities. The defendants contend that her actual capacity is evidenced by her ability to return to work on a full-time basis, her attendance at CrossFit, her attendance in the Douglas College post-graduate program, and her participation in other activities. The defendants suggest the plaintiff has a strong incentive to relate her "aches and pains" to the MVA and note the expert opinions are based almost entirely on her subjective reports of pain.

[113] The plaintiff responds that that the defendants are effectively challenging the veracity of the plaintiff's complaints without an evidentiary basis. The plaintiff submits that the expert and lay witnesses confirm the reliability of her reports of pain and physical limitations. For example, both parties' occupational therapists confirmed the plaintiff's high level of effort in testing and found her pre-test reports on the effect of the pain were generally consistent with her performance.

[114] I am mindful that where a plaintiff's case relies on subjective symptoms, the court must be exceedingly careful in examining the evidence and assessing credibility and reliability: *Price v. Kostryba* (1982), 70 B.C.L.R. 397 (S.C.). A witness may "sincerely attempt to be truthful but lack the perspective, recall or narrative capacity to provide reliable testimony" or may "unconsciously indulge in the human

tendency to reconstruct and distort history in a manner that favours a desired outcome": *Hardychuk v. Johnstone*, 2012 BCSC 1359 at para. 10.

[115] In this case, I found the plaintiff to be generally a credible and reliable witness. There is corroboration for her account of her soft tissue injuries and ongoing pain and its negative impact on her functionality and mental well-being in the evidence of expert and lay witnesses. As noted above, her family members and work colleagues attested to the physical limitations they observed and the expert witnesses consistently reported that her responses were in keeping with their physical findings and pain behaviours they observed.

[116] That said, I found the plaintiff to under-estimate her level of fitness on occasion in her responses during cross-examination. For example, in respect of her attendance at Rocky Mountain fitness, while acknowledging her attendance at the CrossFit gym, she sought to minimize the difficulty of CrossFit exercises and the particular exercises she was performing. In respect of her participation in running in the Sun Run, she was equivocal as to whether she "ran" in the Sun Run or in another run she participated in called the Mother's Day run. When asked about the Sun Run, she said "we walked, we -- we jogged". When then asked about the Mother's Day run, she said "that one was a walk", but then added there was "light jogging".

[117] Nevertheless, I do not accept the defendants' suggestion that the plaintiff's subjective accounts should, therefore, be wholly rejected as unreliable. I consider a more nuanced and contextual assessment is required, which considers that she was trying to return to physical fitness and that she had high standards for herself in terms of what she should be able to achieve. She was described in the evidence as being somewhat of a perfectionist that becomes overwhelmed when stressed. I note that during the period the plaintiff reported she was trying to run, she also reported to Dr. Sam that she could not run any distance without hip pain and fatigue. She did not depict herself as wholly disabled but rather as someone who is limited in what she can do because of the injuries sustained in the MVA.

[118] Where I do not accept the plaintiff's evidence in respect of her level of impairment, I will address this in the course of my reasons.

VII. CAUSATION

[119] The plaintiff must prove on the balance of probabilities that the defendants' negligence caused or materially contributed to an injury. The defendants' negligence need not be the only cause of the injury as long as it was part of the cause beyond the range of *de minimus.*

[120] The primary test to be applied in determining causation is commonly articulated as the "but for" test: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 13-17. A plaintiff bears the burden of showing that "but for" the negligent act or omission of the defendant, the plaintiff's injury would not have occurred. The "but for" test also applies where there is a psychological component to the injury, although consideration must be given to the question of "proximate cause" in law: *Yoshikawa v. Yu*, (1996), 21 B.C.L.R. (3d) 318 (S.C.), varied, (1996), 21 B.C.L.R. (3d) 318 (C.A.). The causation test is not to be applied too strictly, that is, it is not to be determined by scientific precision as it is essentially a practical question of fact best answered by ordinary common sense.

[121] Here, it is not disputed that the MVA caused injury to the plaintiff. However, the parties differ as to the nature and extent of the injuries.

[122] The plaintiff submits, on the basis of the expert reports, that she sustained both physical injuries and psychological injuries. The plaintiff refers to the evidence of her medical experts that the MVA caused soft tissue injuries to her neck, left shoulder/upper back, low back/SI region, and, in particular, a labral tear and synovitis to the left hip. The plaintiff also refers to the evidence that her pain has become chronic. The plaintiff also refers to the evidence of Dr. Lamba that the MVA caused an adjustment disorder with depression and anxiety and a mild pain disorder.

[123] The defendants submit that the MVA was very minor and that it is "extremely unlikely that the plaintiff suffered a life altering hip injury" from the MVA. The defendants note that she was able to go on a planned vacation at the end of December of 2009; returned to work full time in the January of 2010; and returned to work full time after her first maternity leave in 2011. The defendants submit that the plaintiff chose to return part-time after her second maternity leave in 2013, when she was actually able to return full time given her level of fitness and the other activities she was involved in.

[124] Further, with respect to the psychological injury claimed, the defendants note that there were pre-existing mental health issues and other life stressors unrelated to the MVA which were operative. The defendants submit, therefore, that the MVA caused the plaintiff to suffer from only mild soft tissue injuries, from which she has largely recovered, apart from some residual pain.

[125] First of all, I do not accept the defendants' contention that the fact that the plaintiff's vehicle sustained only minor damage means that the plaintiff sustained only minor injury. While I agree that the evidence of damage is a factor to consider in determining what, if any, injuries were caused (see *Hoy v. Harvey,* 2012 BCSC 1076), as noted by Mr. Justice Kent in *Kallstrom v. Yip*, 2016 BCSC 829, it is not appropriate to equate the damage to a vehicle to injuries sustained by the occupants of that vehicle.

[126] In this case, there was no evidence as to the damage sustained to the defendants' vehicle and no biomechanical evidence of the force of the impact on the collision. Further, the plaintiff's experts, Dr. Shuckett and Dr. Badii testified that injury can occur with little or no damage and that rear-end collisions can cause soft tissue injury at minimal speed. There was no evidence adduced to the contrary.

[127] I also do not accept the degree of emphasis placed by the defendants on the plaintiff's initial full-time return to work after the MVA or her taking a planned vacation. I note that the evidence was that the plaintiff struggled upon her return to work after the MVA; she was experiencing persistent pain; and she had to take

medical leaves before her maternity leaves because of the pain she was experiencing and the difficulties she was having with mobility. The medical leaves were supported by her family physician. Although she may have had back and joint pain associated with her pregnancy, I am satisfied that the primary cause of her pain in her hip and back was related to the MVA.

[128] More generally, the expert witnesses called by the plaintiff, as well as the evidence of the lay witnesses, support the conclusion that the MVA caused the plaintiff to become limited in the physical activities she could perform and to have ongoing pain symptoms which contributed to her feeling exhausted. She could not enjoy the family vacation due to pain; she could not participate in running; she could not perform the heavier chores at home; she was not able to keep up with housework; she had difficulty attending to work duties involving lifting and sustained postures; and she could not give her full attention to the children. I note that she reported her anxiety about the health of her unborn baby and about the pain she felt in her left side immediately after the MVA.

[129] Further, when the soreness and pain in her left side continued despite active rehabilitation, she reported feeling depressed to her family physician. I accept that a mere temporal connection between the development of pain and an accident is not determinative by itself that the accident caused the pain and that I must be cautious about relying on a plaintiff's subjective complaints. However, here, the plaintiff's reports of pain were consistent with pain behaviours identified by both lay and expert witnesses. I did not find that there was significant symptom amplification on the part of the plaintiff.

[130] While I agree that it was the plaintiff who initiated the prospect of returning to work on a 50% basis following the birth of her second child and that there were other events in the plaintiff's life at the time which caused her stress, particularly her son's autism diagnosis, I am not persuaded that she would have sought to work less than full time at that juncture but for the accident. I find that the central reason for her decision to speak to her doctor about working part time was her inability to cope with

the pain and functional limitations caused by the MVA. In that regard, I accept her evidence that, prior to the MVA, she had planned to return to work on a full-time basis after her maternity leaves. Although her son's autism diagnosis was a source of stress for her, she had arranged for the 20-25 hour a week intensive behavioural support for her son to be carried out in her home beginning in September of 2013 and had also arranged for family members to provide child care for him when she was working. She was not required to work part time to care for her son.

[131] I find that the plaintiff has established that her soft tissue injuries to the left shoulder, upper and low back, and hip were causally related to the MVA . The causal relationship is supported by the evidence of Dr. Badii, as well as Dr. Gilbart and Dr. Masri. I find that the soft tissue injury in her shoulder largely resolved within a few months, but the pain in her low back and hip continued.

[132] Of particular significance was the plaintiff's hip injury. I am satisfied that the plaintiff's injury to her hip resulted from the MVA, and caused ongoing, chronic pain and functional impairment. While the orthopaedic experts, Dr. Gilbart and Dr. Masri disagreed as to whether the pain was from a labral tear, mild chondrosis, and synovitis or was the result of trochanteric pain syndrome, both physicians were of the opinion that the pain and functional impairment in the hip were causally related to the MVA and that her pain symptoms will continue indefinitely. Dr. Gilbart had the benefit of having surgically examined the hip, however, his diagnosis of a labral tear based mainly upon the intra-articular injection was not wholly confirmed in the sense that there was no detachment of the labrum from the acetabulum and the plaintiff did not experience any significant pain relief from the labral debridement. I, therefore, find that Dr. Masri's diagnosis of trochanteric pain syndrome is the more likely cause of the injury to the hip and that it was causally related to the MVA.

[133] I would add that while the surgery conducted by Dr. Gilbart was ultimately not successful in relieving the plaintiff's symptoms, I am satisfied that the surgery recommended by Dr. Gilbart was a reasonable course of action to try and improve her quality of life. In any event, I reiterate that whether the underlying cause of the

plaintiff's symptoms is intra-articular or extra-articular, her pain symptoms are chronic and unlikely to improve significantly.

[134] With respect to the cause of the psychological injuries, it is not disputed that the plaintiff had a history of anxiety and mild depression before the accident. She had sought psychiatric and psychological counselling for a number of issues over the years and had been prescribed medication to address these issues.

[135] The plaintiff's susceptibility to anxiety and depression does not disentitle her to compensation where the defendants' tortious conduct aggravated her condition: *Janiak v. Ippolito,* [1985] S.C.R. 146 at 152-153; *Kallstrom* at paras. 321-328. In the former case, the Court referred to the general principle that susceptibility to psychological injury from a tortious cause is fully compensable:

> It is, of course, well established that damages for aggravated injuries consequent on some pre-existing infirmity of the plaintiff are recoverable even if the infirmity is of a psychological nature: see, e.g., *Love v. Port of London Authority*, [1959] 2 Lloyd's Rep. 541 (Q.B.); *Gray v. Cotic*, [1983] 2 S.C.R. 2. As Geoffrey Lane J. said in *Malcolm v. Broadhurst*, [1970] 3 All E.R. 508, at p. 511, "there is no difference in principle between an egg-shell skull and an egg-shell personality". Indeed, it would seem that the *locus classicus* of the "thin skull rule", the decision of Kennedy J. in *Dulieu v. White & Sons*, [1901] 2 K.B. 669, was in fact a case of aggravated injuries which were triggered by the impact of the defendant's tortious act on the plaintiff's inchoate psychological hypersensitivity.

[136] However, it is also recognized that if the plaintiff has a pre-existing condition and there is a measurable risk that the condition would have resulted in loss anyway, then the pre-existing risk of loss is to be taken into account in assessing damages: *Moore v. Kyba,* 2012 BCCA 361.

[137] Here, as the plaintiff emphasizes, although she had a vulnerability to anxiety and depression, it would be speculative to suggest that she would have had a psychological breakdown in the future absent the collision. There is no evidence that she took time off work due to anxiety or depression prior to the MVA. She was not seeing a psychiatrist or psychologist at the time of the MVA and the evidence was that her attitude was positive in the fall of 2009. She was physically active, working in a profession she loved, and excited about being pregnant with her first and long

awaited child. While she had reported to her family physician feeling at times stressed and overwhelmed by her work, she was still relatively new to the teaching profession and had only obtained a continuing contract in May of 2008. Accordingly, while she may have been prone to mild depressive episodes or anxiety due to stressors in her life, I am not persuaded she would have sustained a loss (i.e. taken time away from work) due to these conditions had the accident not occurred.

[138] I accept the opinion of Dr. Lamba that the plaintiff's adjustment disorder with mixed anxiety and depression and mild pain disorder were causally related to the MVA and that, as the pain and limitations from the MVA persisted, it caused her increased anxiety and depressive symptoms. While the plaintiff had other significant stressors in her life after the MVA that must be considered, I find the ongoing pain she experienced in her left hip and lower back made it more difficult for her to cope with these stressors. It interfered with her sleep, diminished her energy level, and impaired her ability to perform certain activities at home and at work.

[139] With respect to the plaintiff's psychological condition, I observe that the plaintiff acknowledges that the post-partum depression she experienced for a short period after the birth of her children was not related to the MVA.

[140] With respect to the plaintiff's fainting episode, which occurred shortly after the MVA, I am not persuaded that it was casually related to the MVA. I consider that it is more likely the result of the plaintiff having morning sickness and not eating enough that morning as Dr. Sam had reported. I prefer Dr. Sam's contemporaneous observation over Dr. Shuckett's suggestion that the MVA "might" have contributed to her fainting, particularly given Dr. Shuckett's acknowledgement in cross-examination that not eating enough could have caused the plaintiff to feel faint.

VIII. DAMAGES

A. Non-Pecuniary Damages

[141] Non-pecuniary damages are awarded to compensate the plaintiff for pain, suffering, and loss of enjoyment of life and amenities. They are meant to encompass

such damages suffered up to the date of trial and those that the plaintiff will suffer into the future. The compensation awarded is to be fair and reasonable to the parties, as those concepts are measured against the adverse impact of the particular injuries on the particular plaintiff: *Hunt v. Ugre*, 2012 BCSC 1704. Fairness considers awards made in comparable cases, although they serve only as a guide to appropriate compensation. Each case must be determined on a consideration of its own unique facts: *Hardychuk* at para. 145; *Trites v. Penner*, 2010 BCSC 882 at para. 189.

[142] In *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, Madam Justice Kirkpatrick, writing for the Court of Appeal, outlined a non-exhaustive list of factors for consideration when assessing non-pecuniary damages including:

1. the age of the plaintiff;
2. the nature of the injury; the severity and duration of pain;
3. disability;
4. emotional suffering;
5. loss or impairment of life;
6. impairment of family, marital, and social relationships;
7. impairment of physical and mental abilities;
8. loss of lifestyle; and
9. the plaintiff's stoicism.

[143] Although, a plaintiff's stoicism is also factor, it should not generally penalize the plaintiff: *Giang v. Clayton*, 2005 BCCA 54.

[144] Applying those factors to the instant case, the plaintiff contrasts her position before the MVA and after the collision. Before the MVA, the plaintiff was physically

and socially active, with no pre-existing injuries. After the MVA, her physical and psychological injuries have prevented her from returning to a sense of normalcy. She claims to have sustained “a permanent, life changing injury”. The plaintiff refers to her inability to enjoy special moments in her life such as the family vacation at the end of 2009 and her time with her children. The plaintiff notes that she tried unsuccessfully to return to her previous state of health, through rehabilitation, physiotherapy, and surgery, but was unable to do so because of the persistent pain which she fears will worsen.

[145] The plaintiff refers to a number of cases in which the amount of non-pecuniary damages awarded by this court range from $90,000 to $130,000.

[146] In *Fox v. Danis*, 2005 BCSC 102, aff’d 2006 BCCA 324, the court awarded $100,000 (adjusted for inflation to $118,000) to a plaintiff who was 28 years of age at the time of the accident and suffered soft tissue injury to her cervical and lumbar spine, a prolapsed disc, and compression to her nerve at the L5-S1 level which did not improve with surgery. The plaintiff was found to have chronic, periodic pain in her spine, buttock, and leg, with a risk of consequent depression.

[147] In *Kasidoulis v. Russo*, 2010 BCSC 978, the court awarded $90,000 (adjusted to $99,000) to a 38 year old teacher on call. She was found to have suffered chronic back pain which caused her to be exhausted and unable to do her housework. Her symptoms were aggravated during pregnancy. She was found to have other stressors in her life. There was no surgical intervention. The court found that she had suffered a significant degradation of her quality of life.

[148] *Worobetz v. Fooks*, 2015 BCSC 150 also involved a 45 year old plaintiff who was a mother of three children and had been working as a teacher. The court awarded her $90,000 in non-pecuniary damages. The court accepted that she suffered from chronic low back and hip pain. She was diagnosed with generalized anxiety disorder after the accident, for which she was taking anti-depressant medication. The court concluded that it was unlikely that she would recover completely and become symptoms free.

[149] In *Severud v. Smit,* 2016 BCSC 1021, the court awarded $130,000 to a 38 year old plaintiff who worked as a care aide. The court found ongoing neck and shoulder pain and difficulty sleeping. She received surgery for a labral tear in her left shoulder. The court found that her injuries significantly restricted her enjoyment of life — both in terms of her family and her work.

[150] The plaintiff submits that on the basis of the circumstances which she has and will continue to face her and in consideration of relevant case law, she should be awarded non-pecuniary damages in the amount of $130,000.

[151] The defendants submit that the plaintiff only sustained minor, non-disabling soft tissue injuries to her left hip and low back which injuries were aggravated by sequential pregnancies. The defendants suggest that the plaintiff is seeking a level of damages which would be expected in cases of catastrophic injury, which is not warranted in this case. The defendants suggest that the video surveillance evidence shows that the plaintiff can do more than she suggests. The defendants refer to following cases with a range of damage between $40,000 and $50,000.

[152] *Laroye v. Chung*, 2007 BCSC 1478 involved a 38 year old architect intern who sustained extensive bruises and abrasions in a bicycle accident. The accident was also found to have aggravated pre-existing injuries in his neck and hip. The hip injury resulted in chronic trochanteric bursitis which caused daily aching pain. He took occasional pain killers or iced his hip. There was no surgical intervention. The plaintiff was awarded $40,000 in non-pecuniary damages (adjusted to $47,000).

[153] In *Pavlovic v. Shields*, 2009 BCSC 345, a physiotherapist who was 38 years old at the time of the accident was awarded $50,000 in relation to injuries sustained in two accidents, most significantly a concussion and a jaw and hip injury that temporarily disabled the plaintiff from work. She was diagnosed with minimal detachment and surface sprain of the upper labrum that may require surgery. The amount awarded was discounted by 20% to account for her pre-existing chronic back pain.

[154] In *Rollins. v. Lovely*, 2007 BCSC 1752, a police officer sustained injuries to his neck, shoulder, low back, and left groin area. At trial, he was still experiencing discomfort in his left hip over the greater trochanter, with pain radiating into the groin area. His hip injury rendered him ineligible for certain physically demanding positions, although he had been promoted. He still played hockey and worked out regularly after the accident. His pain was found not to be seriously debilitating and to be transient in nature. He was awarded $40,000 (adjusted to $47,000) for non-pecuniary loss.

[155] In *Grant v. Gonella*, 2008 BCSC 1454, a 52 year old mother of two children and residential care aide was awarded $70,000 for a disc herniation and slight labral tear in the left hip, causing occasional pain down her leg. There was no surgical intervention. The court accepted that the plaintiff's physical capabilities and earning capacity were diminished.

[156] *Chalmers v. Russell,* 2010 BCSC 1662 involved a 40 year old elementary teacher who was 6 months pregnant at the time of the first accident. She sustained soft tissue injuries to her neck, shoulders, hip and low back, and did not return back to work until the child was born and she completed her maternity leave. Her injuries were then aggravated in a second accident. The court awarded the plaintiff $50,000 in non-pecuniary damages noting that she had lost the experience of being pain free and physically active during an important period of the lives of her young children.

[157] In *Tugnait v. Li*, 2005 BCSC 226, the court considered the case of a 35 year old flight attendant who was 3 months pregnant at the time of the accident. She suffered soft tissue injuries to her neck, upper back, and lower back. She took time off work due to her injuries and the pregnancy and then took maternity leave. Her intermittent pain and feelings of exhaustion continued at the time of trial but she did not engage in an active rehabilitation program, in part, due to her pregnancies. The court was satisfied that she would achieve a full recovery. She was awarded $30,000 in non-pecuniary damages.

[158] Recognizing that there is no case which exactly matches the plaintiff's circumstances, I found all of the cases to which I was referred helpful. However, in my view, the cases of *Kasidoulis, Worobetz, Chalmers,* and *Tugnait* are the most similar comparators cited by counsel to the extent that they involved plaintiffs who were pregnant at the time they were injured and/or were relatively young teachers with similar injuries. In *Chalmers* and *Tugnait,* the court awarded significantly less in non-pecuniary damages than in the other cases. However, I note that in the *Chalmers* case, the court found that the plaintiff's injuries did not prevent her from working full time and there was no surgical intervention for her injuries. In *Tugnait,* there was also no surgical intervention and the court concluded that she would achieve a full recovery within three years. Notably, the court in *Chalmers* accepted the significance of a plaintiff being afflicted with pain when she has infant children:

> [123] Importantly, Ms. Chalmers has lost the experience of being a relatively pain-free, physically active mother of her infant children during an important period in their young lives. This is clearly a huge loss for Ms. Chalmers.

[159] In the instant case, I find that the plaintiff similarly lost the experience of being a pain free, physically active mother to her infant children. Prior to the MVA, she had been active — working full time, running several times a week, participating in fitness classes, and engaging in other recreational activities. She was very much looking forward to becoming a mother.

[160] After the MVA, she struggled with pain and was limited in the activities she could participate in with the children due to pain and fatigue. While it was acknowledged that women may become tired during pregnancy and may have various related pains, I find that the pain experienced by the plaintiff was mainly centered in her hip and was, together with the other soft tissue injuries, sufficiently painful that it was interfering with her sleep and causing her to be anxious and depressed because she could not do all she wanted to do for and with her children. Her enjoyment of her pregnancies and early years with her children was detrimentally affected by the MVA.

[161] Her pain and lack of energy also interfered with her relationship with her husband, family, and friends. While I do not discount that having a young family can change the dynamic with family members and friends, I accept the evidence that she slowed down and became less social and somewhat reclusive. Her relationship with her husband has been strained by her depressed mood and fatigue.

[162] While the defendants suggest that it is telling that the video surveillance evidence shows that the plaintiff can perform such activities as lifting her child into the car and "running" short distances after one of her children, I note that the plaintiff did not deny that she has had to occasionally lift her children or "run" a short distance to keep them safe, however she said that it causes her pain to do this. Further, contrary to the suggestion of the defendants, in my view, the video surveillance evidence tends to corroborate the evidence of the plaintiff's limited role with her children and depressed affect. There is little physicality or joy evident in her interactions with the children or in her interactions with other family members in the video surveillance tapes I observed.

[163] It is evident from the plaintiff's own reports of her pain to Mr. Pakulak that the pain was intermittent and not generally severe. I am satisfied that it was nevertheless daily, persistent, and debilitating. There were periods of aching pain and some periods of sharp pain. She has had to endure this pain for an extended period and, according to the medical evidence, it is not likely to abate in the future. While she has been able to participate in exercise conditioning programs, she has not been able to return to running — which she enjoyed and which was, for her, a means of relieving stress. And while the defendants reference her participation in CrossFit and the organized runs, I am satisfied that these occurrences were valid attempts by the plaintiff to manage her pain and live an active life. Even these activities were negatively affected by her injuries.

[164] She has also had to endure limitations in what she can do at home and at work. I find that she is not able to do the heavier household chores. She has been able to make some modifications in her teaching to address her physical limitations

but is unable to fully meet the demands of a busy classroom. I accept that she required some reduction in her assignment as I will discuss further.

[165] In my view, the plaintiff's chronic pain, physical limitations, and impaired psychological well-being caused by the defendants' negligence has had and will continue to have a significant effect on her life. I assess the amount of non-pecuniary damages for losses suffered at $95,000.

B. Loss of Past Earning Capacity and Loss of Future Earning Capacity

[166] The legal principle that governs the assessment of loss earning capacity is that, insofar as possible, the plaintiff should be put in the position she would have been in but for the injuries caused by the defendants' negligence: *Gregory v. Insurance Corporation of British Columbia,* 2011 BCCA 144 at para. 32.

[167] The legal framework that informs an award for loss of earning capacity was instructively summarized by Madam Justice Dardi in *Midgley v. Nguyen,* 2013 BCSC 693:

> [236] The recent jurisprudence of the Court of Appeal has affirmed that the plaintiff must demonstrate both an impairment to his or her earning capacity and that there is a real and substantial possibility that the diminishment in earning capacity will result in a pecuniary loss. If the plaintiff discharges that requirement, he or she may prove the quantification of that loss of earning capacity either on an earnings approach or a "capital asset" approach: *Perren v. Lalari*, 2010 BCCA 140 at para. 32. Regardless of the approach, the court must endeavour to quantify the financial harm accruing to the plaintiff over the course of his or her working career: *Pett v. Pett*, 2009 BCCA 232 at para. 19; *X. v. Y* at para. 183.
>
> [237] As enumerated by the court in *Falati v. Smith*, 2010 BCSC 465 at para. 41, aff'd 2011 BCCA 45, the principles which inform the assessment of loss of earning capacity include the following:
>
> > (i) The standard of proof in relation to hypothetical or future events is simple probability, not the balance of probabilities: *Reilly v. Lynn*, 2003 BCCA 49 at para. 101. Hypothetical events are to be given weight according to their relative likelihood: *Athey* at para. 27.
> >
> > (ii) The court must make allowances for the possibility that the assumptions upon which an award is based may prove to be wrong: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at 79 (S.C.), aff'd (1987), 49 B.C.L.R. (2d) 99 (C.A.). Evidence which supports a contingency

> must show a "realistic as opposed to a speculative possibility": *Graham v. Rourke* (1990), 75 O.R. (2d) 622 at 636 (C.A.).
>
> (iii) The court must assess damages for loss of earning capacity, rather than calculating those damages with mathematical precision: *Mulholland (Guardian ad litem of) v. Riley Estate* (1995), 12 B.C.L.R. (3d) 248 at para. 43. The assessment is based on the evidence, taking into account all positive and negative contingencies. The overall fairness and reasonableness of the award must be considered: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 11.

[238] Although a claim for "past loss of income" is often characterized as a separate head of damages, it is properly characterized as a component of loss of earning capacity: *Falati* at para. 39. It is compensation for the impairment to the plaintiff's past earning capacity that was occasioned by his or her injuries: *Rowe v. Bobell Express Ltd*., 2005 BCCA 141 at para. 30; *Bradley v. Bath*, 2010 BCCA 10 at paras. 31-32; *X. v. Y* at para. 185.

[239] While the burden of proof relating to actual past events is a balance of probabilities, a past hypothetical event will be considered as long as it was a real and substantial possibility and not mere speculation: *Athey* at para. 27.

[240] This court in *Falati* at para. 40 summarized the pertinent legal principles governing the assessment of post-accident, pre-trial loss of earning capacity and concluded that:

> [40] ... the determination of a plaintiff's prospective post-accident, pre-trial losses can involve considering many of the same contingencies as govern the assessment of a loss of future earning capacity. ... As stated by Rowles J.A. in *Smith v. Knudsen*, 2004 BCCA 613, at para. 29,
>
> > "What would have happened in the past but for the injury is no more 'knowable' than what will happen in the future and therefore it is appropriate to assess the likelihood of hypothetical and future events rather than applying the balance of probabilities test that is applied with respect to past actual events."

[168] I will first address past wage loss and then will turn to future loss of earning capacity.

1. Past Wage Loss

[169] The plaintiff claims $125,000 for net past wage loss based on the loss due to a reduction in bank sick time, her taking early maternity leaves, time off following hip surgery, and loss from working part time from September 2013 until the time of trial.

[170] The defendants submit that the plaintiff is, at most, entitled to $15,000 for past wage loss. They contend that the time she took off after the MVA was due to the

fainting incident and not the MVA; that her taking medical leave prior to her maternity leave was due to maternity related conditions; and that the evidence falls short of establishing an inability to return to work on a full-time basis. Alternatively, they claim a contingency deduction ought to be made to the claim of reduced banked sick time attributable to the MVA: *Rizzolo v. Brett*, 2009 BCSC 732 and *Burton v. Bouwman*, 2010 BCSC 371.

[171] As noted by the defendants, Mr. Justice Pearlman recently summarized the approach for assessing past wage loss in *White v. Bysterveld,* 2016 BCSC 1952:

> [207] The burden of proof of actual past events is a balance of probabilities. An assessment of loss of both past and future earning capacity involves consideration of hypothetical events. The plaintiff is not required to prove these hypothetical events on a balance of probabilities. The future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation: *Athey v. Leonati*, at para. 27.
>
> [208] On a claim for past loss of earning capacity, the plaintiff must first establish on a balance of probabilities that the injuries she sustained caused an impairment of her earning capacity. Then, in determining what might have happened in the past to enable the plaintiff to earn income, but for the accident, the court must decide if the event was a real and substantial possibility, and then determine the likelihood of it occurring: *Smith v. Knudsen*, 2004 BCCA 613 at paras. 28, 29, 36 and 37.

[172] I will first address the past wage loss claim as it relates to her return to work on a 50% basis following her second maternity leave. In this case, I have also considered the defendants' submission that the plaintiff had communicated to the School District that she wanted to job share prior to applying for partial sick leave in September of 2013 and that the plaintiff had effectively demonstrated that she did not need to work part time due to her injuries from the MVA as she returned to work full time in January of 2010 and again in September of 2011.

[173] At first blush, this evidence appears to support the conclusion that the plaintiff was capable of working on a full-time basis and, therefore, there was no impairment in her earning capacity. However, as noted above, this conclusion does not give sufficient consideration to the difficulty the plaintiff experienced when she returned to work full time after the MVA, including having to take medical leave before her

scheduled maternity leave. I am satisfied from the evidence of the plaintiff, as well as that of her teaching colleagues, friends, and family members, that she struggled after the MVA and increasingly suffered from fatigue and depression when her injuries did not improve. I do not accept the defendants' contention that it was the fainting episode that was the cause of her to take time off work in late 2009 and early 2010. I find that she took time away from work due to the MVA.

[174] Further, I am satisfied from the functional capacity evaluations conducted by the occupational therapists retained by the plaintiff and the defendants that the plaintiff's pain complaints were genuine and that she had functional limitations related to her teaching duties, including standing in work intensive postures and below waist level work. While I accept that the plaintiff was able to modify her body positions to alleviate her symptoms to a degree, a classroom is a busy, dynamic work environment and she had to manage her instructional program and the students in a manner that met their needs. I accept that it was not always practical to assume a posture that might be optimal for her symptom management and that her lunchtime and recess breaks would not likely allow her any significant period to rest. This likely contributed to her fatigue.

[175] In my view, it was reasonable for the plaintiff to seek the support of her physicians to work on a part-time basis following her second pregnancy in circumstances where she had struggled working full time and she was scheduled to have surgery on her hip — which ultimately occurred in January of 2015. I note that Dr. Sam expressly supported the plaintiff working on a 50% basis.

[176] I accept that the plaintiff continued to be limited to a 50% assignment during her recovery from hip surgery and for a subsequent period for rehabilitation, which occurred during the 2015/2016 school year. As I conclude that she was not able to work significantly more than 50% of the time until the time of trial in the Fall of 2016, I accept the calculation of her past wage loss prepared by Mr. Benning, as modified by the plaintiff in her submissions. In that regard, I note that Mr. Benning discounted past wage loss for various factors including partial years of earning, sick pay earned,

short and long term benefits paid, maternity leave payments, and income tax and employment insurance premiums. The plaintiff further discounted her loss for the three month period of unpaid leave which the plaintiff took at the conclusion of her second maternity leave. Accordingly, I award the plaintiff $125,000 for past wage loss.

2. Future Loss of Earning Capacity

[177] The plaintiff advances a loss of capacity claim of $560,000. This includes loss of pension benefits and the negative labour market contingencies accounted for by Mr. Benning and an additional 20% contingency to account for the possibility of increasing her hours (e.g. to three days a week, as opposed to her current schedule of only two days every other week). The plaintiff relies on the report of Mr. Benning in calculating her future loss of earnings.

[178] The plaintiff submits that the suggestion of the defendants' occupational therapist, Ms. Smith, that the plaintiff could work four days a week is unduly optimistic and unrealistic in requiring the plaintiff to use Saturday as a rest day because it would take away weekend time with her family.

[179] The defendants submit that the evidence does not prove that the plaintiff has established a real and substantial possibility of a future income loss as the plaintiff intended to return to work on a part-time basis and her functional capacity test results indicate that, at most, she may experience some discomfort in performing work related duties. The defendants referred to the decisions of the court in *Salvatierra v. Vancouver (City),* 2008 BCSC 537 and *Chalmers.* In both cases, the court declined to accept the plaintiffs' claim that they were unable to work full time due to MVA related injuries.

[180] The defendants contend that the actual reason for the plaintiff's decision to work part time is the fact that she has two young children, one of whom has been diagnosed with autism. Further, even if the plaintiff has some discomfort at the end of the workday, they submit that it is not of such a degree that there is impairment in

her working capacity. The defendants, therefore, submit that the plaintiff is not entitled to any award for future loss of capacity.

[181] Mr. Justice Pearlman in *White* summarized the test for assessing future wage loss as follows:

> [229] In *Perren v. Lalari*, 2010 BCCA 140, Garson J.A., after reviewing the authorities, identified the basic principles articulated in *Athey* and *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229, as:
>
> > 1. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation [*Athey* at para. 27], and
> >
> > 2. It is not loss of earnings, but, rather, loss of earning capacity for which compensation must be made [*Andrews* at 251].
>
> [230] As Garson J.A. emphasized in *Perren* at para. 32, the plaintiff must always prove there is a real and substantial possibility of a future event leading to an income loss. If the plaintiff meets that burden, then the plaintiff may prove the quantification of the loss of earning capacity on either an earnings approach or a capital asset approach. Where the loss is readily measurable, the earnings approach will be more useful than the capital assets approach.
>
> [231] Where the assessment is based on the capital asset approach, the court must consider the four questions in *Brown v. Golaiy* and make findings of fact concerning the nature and extent of the plaintiff's loss of capacity and how that loss may impact the plaintiff's ability to earn income: *Morgan v. Galbraith*, 2013 BCCA 305 at para. 56.
>
> [232] I must first determine whether the plaintiff has established a real and substantial possibility of a future event leading to an income loss. If so, the court must assess, rather than calculate damages according to the likelihood of the event occurring. The award must be adjusted for both positive and negative contingencies, and the court must consider the overall fairness and reasonableness of the award: *Rosvold* at para. 11.

[182] In this case, I find that the plaintiff has established that her earning capacity has been impaired and that there is a real and substantial possibility that the diminishment in earning capacity will result in a loss of income. I do not agree that the plaintiff's limitations can fairly be described as causing her mere "discomfort". I conclude that the evidence supports her continuing to have functional limitations affecting the performance of her teaching duties on a daily basis, such as her ability to perform tasks associated with sustained or repetitive postures. As noted above, the evidence of Dr. Masri and Dr. Gilbart was that her chronic pain in her hip and

lower back will likely continue and the evidence of Dr. Lamba was that her pain has an emotional component which affects how she deals with stressors. While she has been able to make a number of work modifications, they do not wholly alleviate her limitations.

[183] Further, as a result of the physical and psychological injuries sustained in the MVA, I believe that the plaintiff has become less marketable and attractive as an employee to prospective employers. As was stated by Mr. Justice Voith in *Sevinski v. Vance*, 2011 BCSC 892 at para. 105, it is reasonable to infer that "an employer who is aware that an employee suffers from some level of chronic pain may be less likely to employ that person".

[184] In my view, the authorities referenced by the defendants are distinguishable. In *Salvatierra,* the court found that the plaintiff's residual pain did not prevent her from working full time and that her part-time status was largely a function of the nature of the work and variety of contracts she performed. In *Chalmers*, the court found there to be an absence of medical evidence supporting her inability to work more than two days a week.

[185] However, in considering the extent of the plaintiff's loss, I am not persuaded that the plaintiff has demonstrated that there is a real possibility that she is limited to a half-time assignment. By the time of trial, the plaintiff was able to participate in a rigorous, CrossFit exercise conditioning program. Although she could not perform certain exercises such as running and had to modify certain other exercises, I consider that her enhanced level of conditioning reflects a more positive outlook in relation her future work capacity and, specifically, her ability to work more than in a 50% assignment. I accept Ms. Smith's suggestion that the plaintiff could work four days a week with a rest day mid-week (i.e. in an 80% assignment). I find this suggestion reasonable in circumstances where the plaintiff was able to work three consecutive days on alternate weeks and I reject the plaintiff's contention that it would be unfair for her to have to use a weekend day for further rest. Accordingly, while I conclude that the plaintiff is not able to work on a full-time basis given her

pain and functional limitations, an 80% assignment would be in keeping with her capacity by the time of trial. In that regard, I also accept Ms. Smith's evidence that there are additional ergonomic aides and work style modifications that may, over time, assist the plaintiff to increase her hours.

[186] In considering non-speculative positive and negative contingencies, I also accept that while the plaintiff planned to work full time and had initially arranged her child care on that basis, the actual demands of her two children as well changing priorities over the course of her working life may have resulted in her voluntarily working less than full time in any event. In my view, it is appropriate to give some consideration to this possibility, as well as the other contingencies referred to by the parties.

[187] Further, I accept that it is likely that the plaintiff would complete her advanced certification to qualify for a "category 5+15" placement on the teachers' salary scale, given the commitment she has already demonstrated to enhancing her teaching qualifications.

[188] Bearing in the mind the applicable legal principles and that quantification of loss is not a strict mathematical calculation (*Rosvold v. Dunlop*, 2001 BCCA 1 at para. 11), in all of the circumstances I conclude that the sum of $295,000 is the present value of a fair and reasonable assessment of the loss of the plaintiff's future income-earning capacity.

C. Future Care Costs

[189] The plaintiff is entitled to compensation for the cost of future care based upon what is reasonably necessary to restore her to her pre-accident condition insofar as possible.

[190] The award is to be based on what is reasonably necessary on the medical evidence to preserve and promote the plaintiff's mental and physical health: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.) at 78, aff'd (1987) 49 B.C.L.R. (2d) 99 (C.A.); *Spehar (Guardian ad litem of) v. Beazley*, 2002 BCSC 1104 at para. 55, aff'd

2004 BCCA 290; *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at para. 30. While a physician need not testify to the medical necessity of every item of care that is claimed, there must be some evidentiary link drawn between the physician's assessment of the plaintiff's condition and recommended treatment and the care recommended by a qualified health care professional: *Gregory* at para. 39.

[191] In *Prempeh v. Boisvert*, 2012 BCSC 304, Madam Justice Dardi observed that:

> [108] The assessment of damages for cost of future care necessarily entails the prediction of future events: *Courdin v. Meyers*, 2005 BCCA 91 at para. 34; *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9, [2002] 1 S.C.R. 205 at para. 21. The courts have long recognized that such an assessment is not a precise accounting exercise and that adjustments may be made for "the contingency that the future may differ from what the evidence at trial indicates": *Krangle* at para. 21; *X. v. Y*. at para 267. The extent, if any, to which a future care costs award should be adjusted for contingencies depends on the consideration of the specific care needs of the plaintiff and the expenditures that reasonably may be expected to be required - taking into account the prospect of any improvement in the plaintiff's condition or conversely the prospect that additional care will be required: *O'Connell v. Young*, 2012 BCCA 57 at paras. 67-68; *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 253.

[192] The resulting award is to reflect the reasonable or normal expectations of what the injured person will require and is to produce a result fair to both the claimant and the defendant: *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at paras. 21-22.

[193] The plaintiff claims the present value of items recommended by Ms. Allende in her report on the cost of future care including rehabilitation services (occupational therapy, physiotherapy, chiropractic, and counselling); house cleaning and seasonal cleaning; medications (Tylenol Arthritis, Cipralex, Ativan); assistive equipment and supplies (stool, anti-fatigue mat, memory foam); and a gym pass.

[194] Overall, the defendants submit that the plaintiff's future care costs should be very limited on the basis that the soft tissue injuries were relatively minor. The defendants refer to Ms. Smith's response report to that of Ms. Allende.

[195] In considering the submissions of the parties, I note that Ms. Smith agreed with certain of the recommendations of Ms. Allende but she differed in her opinion on the cost of the care required by the plaintiff. Ms. Smith did not agree with certain other of the recommendations of Ms. Allende, as noted below.

1. Rehabilitation Services

[196] I accept the opinion of the occupational therapists that the plaintiff requires occupational therapy to effectively implement pacing and mood management into her daily routine and otherwise increase her participation in a wider range of activities. However, as some of the follow-up recommendations after the initial assessment and intervention could be done by telephone, I consider a reasonable amount for the present value of the cost of rehabilitation occupational therapy and for treatment of flare ups with a physiotherapist to be $10,800. I agree with the defendants that chiropractic treatment is not medically supported.

[197] Although the defendants dispute an amount for psychological counselling on the basis that her psychological condition is not related to the MVA, I note that Ms. Smith agreed with the recommendation for counselling. In any event, I consider that the evidence supports the plaintiff benefitting from psychological counselling to cope with her chronic pain and award $2,100 as the present value of such services.

2. Household Support

[198] Ms. Allende and Ms. Smith agree that the plaintiff will require some household support for heavier and seasonal cleaning but disagree as to the level of support. Both occupational therapists would vary the amount of cleaning support over time to account for the plaintiff's needs and circumstances. In that regard, Ms. Smith would increase the amount of cleaning support should the plaintiff increase her hours of work.

[199] That said, I note that the plaintiff used a weekly cleaning service at the time of the MVA for general cleaning. I have taken into account the likelihood that the plaintiff would have continued to utilize such services had the accident not occurred,

although I observe the plaintiff will now likely require more hours than previously due to her limitations in respect of the heavier and seasonal cleaning and the size of her current home. I award the plaintiff $20,000 as the present value of household support services.

3. Gym Pass

[200] It is the defendants' position that no award should be made as the plaintiff would have incurred the cost of a gym membership in any event.

[201] The plaintiff submits that a conditioning program is required for symptom management and proposes two scenarios to maintain the plaintiff's physical fitness and symptom management: the first would allow the plaintiff to continue at her current, privately operated CrossFit gym and the second would provide a membership at a community gym.

[202] In my view, the evidence supports the plaintiff's requiring an exercise conditioning program for symptom management. However, there is no medically supported evidentiary basis to continue with the privately operated facility on an ongoing basis. I, therefore, award $9,300 as the present value of a gym membership at a community facility.

4. Medications

[203] The plaintiff claims anti-anxiety and anti-depressant medications as well as an analgesic (Tylenol) for pain. The defendants contest the former medications on the basis of the plaintiff's history of using this type of medication prior to the MVA. They do not challenge the pain medication.

[204] While I accept that the plaintiff was taking various anti-anxiety and anti-depressant medications prior to the MVA, the plaintiff's pre-existing psychological condition was exacerbated by the MVA. I award the plaintiff $7,800 as a fair and reasonable estimate of the present value of the Tylenol and a portion of the cost of the medication for anxiety and depression.

5. Assistive Equipment

[205] The occupational therapists support the provision of a counter height stool, an anti-fatigue mat, and a memory foam mattress overlay for the plaintiff's symptom management and to help improve her quality of sleep. I consider the plaintiff's need for this equipment results from the injuries sustained in the MVA and award $4,050 for the costs.

[206] In summary, I award the plaintiff $54,050 for her future care costs.

D. Special Damages

[207] An injured person is entitled to recover the reasonable out of pocket expenses incurred as a result of the accident. This is grounded in the principle that an injured person is to be restored to the position he or she would have been in had the accident not occurred, *X. v. Y.,* 2011 BCSC 944 at para. 281; *Milina* at 78.

[208] The plaintiff seeks $20,000 in special damages which she submits are reasonable and compensable. The defendants agree that $12,749 is compensable for parking, physiotherapy, massage therapy, pain medications, physician consultation and form fees, SI injections, and gym fees, but submit that the remaining expenses claimed are not medically recommended or the result of the MVA.

[209] I agree that certain of the expenses claimed by the plaintiff are not reasonable or are related to the MVA (i.e. $5,000 for a naturopathic weight loss program; $200 for a massage at Canyon Ranch Club Spa; $1,136 for weight loss injections; $3,585 for CrossFit at Rocky Point Fitness; and $110 for expenses related to the fainting episode). However, I am satisfied that the following special expenses are reasonable expenses related to the MVA: $1,550 for counselling, $400 for anti-depressant medication, $155 for a learning to run clinic, $55 for a post-operative handicap pass, and $600 for housekeeping. Accordingly, I award special expenses in the amount of $15,510.

IX. CONCLUSION

[210] In summary, the damages awarded to the plaintiff are assessed as follows:

$95,000 in non-pecuniary damages;

$125,000 for loss of past earning capacity;

$295,000 for loss of future earning capacity;

$54,050 for future care costs; and

$15,510 for special damages

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Total: $584,560

[211] Should the parties need to make submissions on the issue of costs, they may make arrangements through Supreme Court Scheduling.

"Harris, J."